

THE HONORABLE RICARDO S. MARTINEZ

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY, WASHINGTON

Plaintiff,

vs.

MERRILL LYNCH & CO., INC., et al.

Defendants.

CIVIL ACTION No. 2:10-cv-01156 RSM

**DEFENDANTS MERRILL LYNCH &
CO., INC., MERRILL LYNCH
MONEY MARKETS, INC. AND
MERRILL LYNCH, PIERCE,
FENNER AND SMITH, INC.'S
MOTION TO STRIKE
ALLEGATIONS FROM FIRST
AMENDED COMPLAINT**

**NOTE ON MOTION CALENDAR:
MARCH 16, 2012**

ORAL ARGUMENT REQUESTED

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1 The Merrill Lynch Defendants (“Merrill Lynch”) hereby move this Court pursuant to
 2 F.R.C.P. Rule 12(f) for an order striking the following paragraphs from Plaintiff’s First
 3 Amended Complaint (“FAC”): 2, 6, 7, 34, 43 (lines 22-23), 81, 92 (lines 13-14), 98 (line 16),
 4 109-110, 118-128, 131, 135 (lines 3-4), 138, 147 (lines 3-7), 157 (lines 19-20), 158, 176, 178,
 5 187(a), 188(i), 188(n), 188(o), 196(a), 197(i), 197(n), 197(o), 206(l) and Footnote Nos. 2, 5, 12,
 6 37, 42, 44-51, 55, and 64.

7 **I. INTRODUCTION**

8 Plaintiff’s FAC, as presently constituted, is an impermissible mélange of irrelevant,
 9 reckless and inflammatory allegations that not only threatens to turn the pleading requirements of
 10 F.R.C.P. Rule 8 on its head but, absent Court intervention, would transform a relatively straight-
 11 forward claim regarding Plaintiff’s purchase of two securities into a trial over the national credit
 12 crisis of 2007. Under Rule 8, Plaintiff is required to submit a short and plain statement of the
 13 case with “simple, concise and direct” factual allegations showing that it is entitled to relief.
 14 Because the factual circumstances of Plaintiff’s purchases of the two securities at issue do not
 15 stand on their own to support a claim, Plaintiff has amended its complaint with a sprawling
 16 narrative that draws from unsupported assertions made in other complaints (including complaints
 17 dismissed at the pleading stage) to string together a series of unwarranted and speculative
 18 inferences regarding Merrill Lynch’s purported role in the securities markets and alleged
 19 prescient knowledge of the worldwide collapse of the capital and credit markets.

20 Despite the prolix nature of the FAC, this action is, and always has been, about Plaintiff’s
 21 purchases of commercial paper issued by Mainsail II and Victoria Finance. Plaintiff made the
 22 purchases of those securities on July 27, July 31, and August 2, 2007 through its account with
 23 Merrill Lynch. In its original complaint, Plaintiff alleged that it selected and purchased those
 24 securities based on its own research, and that Merrill Lynch did not solicit or recommend those
 25 purchases. The FAC now takes more than one hundred pages to assert that Plaintiff purportedly

1 purchased these securities based on a “recommendation” from Merrill Lynch without being
 2 aware that they included subprime mortgage-backed assets. These new allegations not only
 3 contradict Plaintiff’s prior judicial admissions regarding the circumstances of its purchases, they
 4 are also contradicted by the offering documents referenced in the complaint. Those offering
 5 documents, sent to Plaintiff prior to its purchases, contained detailed explanations of all the risks
 6 of which Plaintiff now claims to have been unaware of and specifically disclose that 90% of the
 7 assets of Mainsail could consist of subprime securities.

8 The FAC’s newly-asserted ignorance is also contradicted by the irrefutable fact that
 9 Plaintiff purchased Mainsail from other dealers on at least eight prior occasions over a period of
 10 more than one year before its County Investment Officer (“CIO”) first purchased Mainsail from
 11 Merrill Lynch. Moreover, on the day before Plaintiff’s purchase of Mainsail from Merrill Lynch
 12 at issue, Merrill Lynch advised Plaintiff that the market was becoming much more volatile and
 13 recommended that Plaintiff consider joining the “flight to quality” by purchasing bonds issued
 14 by the Federal Home Loan Banks, which are government sponsored entities.

15 In the FAC, Plaintiff submitted a lengthy narrative disclosing none of these essential and
 16 undeniable facts. Rather, the FAC is a series of speculative and unwarranted inferences drawn
 17 largely from unsupported allegations in other complaints filed in the wake of the financial crisis.
 18 Plaintiff now seeks to use these new allegations to support its demands for expansive discovery
 19 in its quest to find some evidentiary support for its claims. “A complaint alleging fraud should
 20 be filed only after a wrong is reasonably believed to have occurred; it should serve to seek
 21 redress for a wrong, not to find one.” *Segal v. Gordon*, 467 F.2d 602, 607-08 (2d Cir. 1972).
 22 Particularly in cases asserting claims for fraud, courts seek to “inhibit the filing of a complaint as
 23 a pretext for discovery of unknown wrongs.” *Gross v. Diversified Mortg. Investors*, 431 F.Supp.
 24 1080, 1087 (S.D.N.Y. 1977).

25 Plaintiff’s FAC includes four categories of allegations that should be stricken pursuant to

1 Rule 12(f). The first category of allegations, concerning Merrill Lynch's purported role in the
 2 securities markets and its purported knowledge of the future collapse of the securities markets
 3 are largely borrowed from other complaints, are irrelevant to Plaintiff's purchases of Mainsail
 4 and Victoria or the actual legal claims Plaintiff is attempting to assert, and would dramatically
 5 expand the scope of both discovery and trial in this matter.

6 The second category of allegations, regarding a purported quid pro quo agreement
 7 between Merrill Lynch and Mainsail, parrot the allegations made against other financial
 8 institutions in other actions regarding its involvement with Mainsail, and Plaintiff has attempted
 9 to back into the same claims through a series of implausible and unwarranted inferences that
 10 should be disregarded and stricken from the FAC. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544
 11 (2007). The third category of allegations, Plaintiff's own commentary about positions taken in
 12 this litigation, are impertinent and should not be included in a complaint. The last category of
 13 allegations, regarding a purported recommendation, are immaterial because they are contradicted
 14 by Plaintiff's earlier pleading and by the offering documents.

15 For all of the reasons set forth herein, Merrill Lynch respectfully requests an order from
 16 the Court striking the prayed for paragraphs from the FAC so that this litigation, if it is to go
 17 forward at all, can go forward in a manner designed to resolve the specific disputes at issue.

18 **II. STATEMENT OF FACTS**

19 Plaintiff is an institutional investor that manages the King County Investment Pool with
 20 assets of \$4 billion. Before entering into the purchases at issue here, Plaintiff bought, on dozens
 21 of occasions, hundreds of millions of dollars of commercial paper as part of its cash management
 22 strategies. The specific securities at issue here, commercial paper issued by "Mainsail II" and
 23 "Victoria Finance", were purchased by Plaintiff in the summer of 2007. In the summer of 2007,
 24 the Investment Pool owned approximately \$1 billion in commercial paper investments, all
 25 managed and selected by the CIO. (FAC ¶ 172). On July 27, 2007, the CIO searched for

1 additional commercial paper to purchase for the Investment Pool. (FAC ¶ 176). Following his
 2 customary practice, the CIO viewed the inventories of commercial paper offered for sale by the
 3 approved dealers through his own Bloomberg terminal and researched the credit ratings and
 4 other factors. *Id.* After reviewing the investment options available to him that day, the CIO
 5 chose to purchase commercial paper offered by an entity known as Mainsail, phoning in the
 6 order to Merrill Lynch to purchase the Mainsail commercial paper in the face amount of \$25
 7 million. (FAC ¶¶ 176-177). Four days later, Plaintiff followed the same practice and purchased
 8 additional Mainsail commercial paper in the face amount of \$28.488 million. (FAC ¶ 178).

9 Plaintiff initiated this action by acknowledging in its complaint that Merrill Lynch did not
 10 solicit or recommend the July 27 and July 31 purchases of Mainsail (Compl. ¶¶ 78-87, 93).
 11 Plaintiff now alleges, for the first time in its FAC, that Merrill Lynch's financial advisor
 12 "recommended" the purchase by emailing the CIO two weeks prior to the purchases and
 13 identifying Mainsail as one of the "CP offerings you might like." (FAC ¶¶ 10 n.5, 138). The
 14 FAC fails to inform the Court that Plaintiff had purchased more than \$200 million of Mainsail
 15 commercial paper on eight prior occasions in 2006 and 2007 from securities dealers other than
 16 Merrill Lynch and *before* Merrill Lynch was even a dealer for Mainsail. The FAC similarly fails
 17 to allege that on the day before Plaintiff's initial Mainsail purchase from Merrill Lynch, the same
 18 individual now alleged to have recommended Mainsail in fact sent an email to Plaintiff's CIO
 19 advising that the market was becoming more volatile and that Plaintiff should consider a "Flight
 20 to Quality" by purchasing bonds issued by the Federal Home Loan Banks. The fact is that
 21 Plaintiff rejected that recommendation and instead chose to purchase Mainsail in an effort to
 22 obtain a higher yield than was available via the government-sponsored entity bonds Merrill
 23 Lynch had suggested.

24 Plaintiff also falsely alleges in its FAC that it was unaware that Mainsail contained
 25 subprime assets. In fact, Merrill Lynch sent Plaintiff the Private Placement Memorandum

1 (“PPM”) for Mainsail on July 18, 2007, nine days before Plaintiff purchased Mainsail on July 27,
 2 2007.¹ The PPM contained detailed explanations of “RISK FACTORS” disclosing all of the
 3 risks that Plaintiff now falsely claims of which it was unaware, and **specifically disclosed that**
 4 **90% of Mainsail’s assets consisted of subprime mortgage assets.**² The PPM also warned of
 5 current unfavorable market conditions, stating “[a]ccording to recently published reports, the
 6 **residential mortgage market in the United States has experienced a variety of difficulties**
 7 **and changed economic conditions that may adversely affect the performance and market**
 8 **value of U.S. Residential ABS Securities.** Delinquencies, defaults and losses with respect to
 9 residential mortgage loans generally reportedly have increased in recent months, and may
 10 continue to increase, particularly in the subprime sector. . . .” (RJN, Ex. A at pp. 25-26).

11 Shortly after Plaintiff’s purchases of Mainsail and Victoria, the credit and capital markets
 12 experienced a sudden, unprecedented disruption that proved to be the first symptoms of a global
 13 credit crisis. As the credit crisis grew, rating agencies cut the ratings on numerous classes of
 14 securities, including asset backed commercial paper such as Mainsail and Victoria, and the value
 15 of certain of Plaintiff’s investments declined. To recoup those losses, in addition to this action,
 16 Plaintiff filed separate legal actions for its other investments against Morgan Stanley, Deutsche
 17 Bank and all three national ratings agencies (Moody’s, Standard & Poor’s and Fitch Ratings).

18
 19
 20 ¹ See Request for Judicial Notice (“RJN”), Ex. A. Courts routinely judicially notice offering documents for
 21 securities on the grounds that they are integral to the plaintiff’s claims, even where the plaintiff does not attach them
 22 to or reference them in the complaint. See *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991),
 23 *cert. denied*, ___ U.S. ___, 112 S. Ct. 1561, 118 L.Ed.2d 208 (1992); *I. Meyer Pincus & Assocs., P.C. v.*
 24 *Oppenheimer & Co.*, 936 F.2d 759, 762 (2d Cir. 1991) (as “[t]he prospectus is integral to the complaint . . . We
 25 therefore decline to close our eyes to the contents of the prospectus and to create a rule permitting a plaintiff to
 evade a properly argued motion to dismiss simply because plaintiff has chosen not to attach the prospectus to the
 complaint or to incorporate it by reference.”).

² The Mainsail PPM sent to Plaintiff expressly discloses that “**90% of the Portfolio Principal Balance may consist
 of Residential B/C Mortgage Securities.**” (RJN, Ex. A at p. 84 ¶ 8) (emphasis added). The Mainsail PPM defines
 the term “Residential B/C Mortgage Securities” as “securities . . . that entitle the holders thereof to receive payments
 that depend . . . on the cash flow from *non-prime* residential mortgage loans . . .” *Id.* at p. 189 (emphasis added).

1 III. ARGUMENT

2 A. Legal Standard

3 A court, under F.R.C.P. Rule 12(f), may order stricken from any pleading any redundant,
 4 impertinent, immaterial or scandalous matter. “[W]here the motion may have the effect of
 5 making trial of the action less complicated, or have the effect of otherwise streamlining the
 6 ultimate resolution of the action, the motion to strike will be well taken.” *See State of California*
 7 *v. United States of America*, 512 F. Supp. 36, 38 (N.D. Cal. 1981).

8 If an allegation is “neither responsive nor relevant to the issues involved in the action” it
 9 is deemed to be impertinent. *Wilkerson v. Butler*, 229 F.R.D. 166, 170 (E.D. Cal. 2005). An
 10 allegation will be deemed immaterial if it “has no essential or important relationship to the claim
 11 for relief...being pleaded.” *See Sliger v. Prospect Mortgage*, 789 F. Supp. 2d 1212, 1216 (E.D.
 12 Cal. 2011)(citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) *rev’d on other*
 13 *grounds*, 510 U.S. 517 (1994). While “[c]ourts often require a ‘showing of prejudice by the
 14 moving party’ before the challenged material will be stricken, [] **in the Ninth Circuit such a**
 15 **showing is not required ‘if granting the motion will make the trial less complicated or**
 16 **otherwise streamline the ultimate resolution of the action.’”** *S. California Hous. Rights v.*
 17 *Nijjar*, CV 02-9712 DSF, 2004 WL 5639772 at *2 (C.D. Cal. May 26, 2004) (citing *Fantasy,*
 18 *Inc.*, 984 F.2d at 1527) (emphasis added).

19 B. The Market Conduct Allegations are Irrelevant to Plaintiff’s Claims and 20 Should be Stricken as Immaterial.

21 Plaintiff’s FAC contains sprawling allegations that constitute no more than a series of
 22 inferences and conclusions about Merrill Lynch’s purported role in the securities and credit
 23 markets generally and its purported prescient knowledge about the future collapse of the credit
 24 markets based on collateral repossessed from Bear Stearns having nothing to do with anything
 25

1 bought by Plaintiff (the “Market Conduct Allegations”).³

2 The Market Conduct Allegations are drawn from pleadings in other lawsuits, including
 3 specifically the Consolidated Amended Class Action Complaint filed in the matter styled *In re*
 4 *Merrill Lynch & Co., Inc. Securities, Derivative and ERISA Litigation*, Case No. 07-cv-9633
 5 (S.D.N.Y., filed July 22, 2008). (RJN, Ex. B). Plaintiffs in that class action complaint alleged
 6 with respect to the BSAM Funds that “Merrill seized at least \$850 million worth of collateral
 7 assets and indicated that the assets would be auctioned off” and that “[t]he sale . . . at materially
 8 depressed prices, and the failure to sell other CDO assets seized by Merrill, raised yet another red
 9 flag internally within the Company . . . confirm[ing] what . . . Defendants knew all along, namely
 10 that: (i) the CDO market was increasingly illiquid and had materially declined; and (ii) many
 11 CDOs (including CDOs that Merrill underwrote) could be sold only, if at all, for prices
 12 materially below par value.” (*Id.* at ¶¶ 154-161).⁴

13 The FAC borrows the allegations from the Class Action Complaint at paragraphs 119
 14 through 124, none of which has anything to do with Plaintiff’s purchases here. Even more
 15 troubling is Plaintiff’s effort to tie the BSAM assets to its claims here. Plaintiff did not ever
 16 purchase any of those assets. Nevertheless, Plaintiff jumps to the entirely speculative assertion
 17 that because Merrill Lynch had difficulty in trying to sell the securities held by the BSAM funds,
 18 it might have known that securities held by Mainsail might not be priced accurately and may be
 19

20 ³ Plaintiff’s Market Conduct Allegations are borrowed from other lawsuits concerning other securities and are
 21 immaterial to the issues in this case about Plaintiff’s purchases of Mainsail and Victoria because the assets held by
 22 the funds managed by Bear Stearns (BSAM funds) were not the same assets held by Mainsail or Victoria, and
 23 Plaintiff does not allege any claims against Merrill Lynch regarding the BSAM Funds. *See* FAC ¶¶ 118-128, 131,
 135 (lines 3-4), 147 (lines 3-7), 157 (lines 19-20), 188(n), 188(o), 197(n), 197(o), 206(l), and fn 42, 44-51.

24 ⁴ Plaintiff sought discovery from Merrill Lynch regarding its auctions of the BSAM funds’ assets, but Merrill
 25 Lynch objected on the grounds that it was not relevant to the claims alleged in the complaint. Rather than allowing
 the pleadings to guide the scope of discovery, Plaintiff amended its complaint to support the broader discovery that
 it sought outside the scope of the original complaint. Shortly after filing its amended complaint, Plaintiff attempted
 to revive prior discovery requests that were outside the scope of the original complaint, and filed a motion to compel
 shortly thereafter that is currently pending before this Court.

1 marked down in value. (FAC ¶¶ 118-128). As fully briefed in Merrill Lynch's opposition to
 2 Plaintiff's pending motion to compel, there is no connection between Merrill Lynch's efforts to
 3 sell the BSAM funds' collateral and Plaintiff's decision to buy Mainsail or Victoria commercial
 4 paper. Both Plaintiff and the public were well aware (long before Plaintiff purchased Mainsail
 5 from Merrill Lynch) of the BSAM fund failures, Merrill Lynch's role and difficulties in selling
 6 the BSAM collateral and that the subprime market was troubled. (RJN, Ex. C). For this very
 7 same reason, the Market Conduct Allegations are irrelevant to Plaintiff's claim that Merrill
 8 Lynch breached its purported disclosure obligations under the Dealer Certification.

9 Courts have recognized that content from and reference to complaints and other
 10 "preliminary steps in litigation and administrative proceedings that did not result in an
 11 adjudication on the merits or legal or permissible findings of fact are, as a matter of law,
 12 immaterial under Rule 12(f)." *In re Merrill Lynch & Co., Inc. Research Reports Litig.*, 218
 13 F.R.D. 76, 78 (S.D.N.Y. 2003) (citing *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887,
 14 892-94 (2d Cir. 1976) (striking allegations that referred or relied on allegations from other
 15 complaints and appendices to complaints). *See also RSM Prod. Corp. v. Fridman*, 643 F. Supp.
 16 2d 382, 403 (S.D.N.Y. 2009) ("[P]aragraphs in a complaint that are either based on, or rely on,
 17 complaints in other actions that have been dismissed, settled, or otherwise not resolved, are, as a
 18 matter of law, immaterial within the meaning of Fed.R.Civ.P. 12(f).") (citation omitted), *aff'd*
 19 387 Fed. Appx. 72 (2d Cir. 2010). Because Plaintiff's Market Conduct Allegations are clearly
 20 lifted from another, earlier filed lawsuit, they should be stricken as immaterial.

21 Striking the Market Conduct Allegations would "make trial less complicated or eliminate
 22 serious risks of prejudice to the moving party, delay, or confusion of the issues." *Sliger, supra*,
 23 789 F. Supp. 2d at 1216. For these reasons the Market Conduct Allegations should be stricken as
 24 immaterial.
 25

C. The Quid Pro Quo Allegations Should be Stricken as Immaterial Because They Were Borrowed From Another Lawsuit and are Implausible as Pled.

Plaintiff also proffers its own conspiracy theory that Merrill and Mainsail had a “quid pro quo” agreement in April 2007 (and a “game plan” between Merrill and Ceres, the administrator for Victoria) to defraud investors (the “Quid Pro Quo Allegations”).⁵ The Quid Pro Quo Allegations are immaterial, not to mention entirely baseless and implausible to boot, and should be stricken. The FAC alleges, in part on information and belief (FAC ¶ 89, fn 18), that “in a classic Wall Street quid pro quo deal, Mainsail agreed to buy subprime securities that Merrill Lynch was trying to offload—in effect providing a dumping ground for toxic subprime waste that Merrill Lynch was desperate to get rid of—and in exchange Merrill Lynch agreed to place Mainsail’s risky debt offerings.” (FAC ¶ 109).

These allegations parrot the allegations made in a different action against a different financial institution (Barclays) regarding its purported quid pro quo agreement with Mainsail. Those allegations were made in the complaint filed in *Oddo Asset Management v. Barclay’s Bank PLC, et al.*, Case No. 109547/08 (New York Supreme Court Manhattan, filed July 11, 2008). In the *Oddo* complaint, the plaintiff alleged that “[i]n breach of its fiduciary duties, Solent [which served as the investment manager for Mainsail] conspired with Barclays to sell impaired warehoused securities to Mainsail in April and July 2007”, and that “Barclays decided to use Mainsail . . . as a dumping ground for these toxic securities.” (RJN, Ex. D at ¶¶ 138-149). The Supreme Court of the State of New York granted the defendants’ motions to dismiss with prejudice in that case. (RJN, Ex. E). Plaintiff now seeks to shoehorn itself into an identical claim against Merrill Lynch and justify overbroad discovery having nothing whatsoever to do with its purchases. This Court should follow the Court in *Oddo*. At a minimum, as discussed in Section III, B, because “paragraphs in a complaint that are either based on, or rely on, complaints

⁵ See FAC ¶¶ 2, 6, 7, 81, 109-110, 158, 188(i), 197(i), and fn 2, and 64.

1 in other actions . . . are, as a matter of law, immaterial within the meaning of Fed.R.Civ.P. 12(f)”
 2 (*RSM Production Corp, supra*, 643 F. Supp. 2d at 403), the Quid Pro Quo Allegations should be
 3 stricken. Moreover, the allegations as pled are both baseless and implausible.⁶

4 There simply is no evidence of the existence of a quid pro quo agreement with Mainsail
 5 or Victoria to dump toxic assets from Merrill Lynch to Mainsail or Victoria and it would not bear
 6 on Plaintiff’s purchase in any event. Indeed, Mainsail and Victoria are not even mentioned in the
 7 alleged communication. The statements in the communication reflect, on their face, nothing
 8 more than legitimate business and financial transactions. Plaintiff is stretching beyond the realm
 9 of plausibility to infer a nefarious conspiracy from the cited communication. Courts are not
 10 required to accept as true unwarranted deductions of fact, or unreasonable inferences. *See*
 11 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Plaintiff must “state a
 12 claim to relief that is plausible on its face” and must rise above the speculative level. *Twombly*,
 13 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads **factual content** that
 14 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
 15 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (emphasis added).

16 “An inference pressed by the plaintiff is not plausible if the facts he points to are
 17 precisely the result one would expect from lawful conduct in which the defendant is known to
 18 have engaged.” *Braden v. Wal-Mart Stores, Inc.* 588 F.3d 585, 597 (8th Cir. 2009). As Plaintiff
 19 acknowledges in its FAC, “Merrill Lynch was deeply involved in the securitization of mortgage
 20 and other assets and in the underwriting and distribution of Asset Backed Securities (ABS),
 21

22 ⁶ Plaintiff cites only to a March 29, 2007 email, attached as Exhibit 8, as support for its allegations. Yet the email
 23 does not mention Mainsail, and it is implausible to reach Plaintiff’s conclusion based on the following statements:
 24 “Stuart Cutler told us that there are 20+ SIVs out there... Only 1-2 have bought from us...Most of them have
 25 capacity to buy more and [are] looking for assets...Also they are very axed to issue single A paper and have us
 place it for them... I think the game plan should be to talk with each of these accounts w[ith] 2 themes. . . figure
 out a way to place single As off their SIVs for them into our CDOs. . . . sell them or create for them CLOs/TP
 CDOs that they can buy...”

1 especially (but by no means exclusively) Residential Mortgage Backed Securities (RMBS) and
 2 Collateralized Debt Obligation (CDOs).” (FAC ¶ 61). The statements made in the March 29
 3 email simply reflect business communications regarding Merrill Lynch’s lawful business
 4 activities.

5 Plaintiff’s speculative inferences about “unspoken intentions” reflected in the email
 6 cannot support its assertions about a purported far reaching conspiracy to offload toxic subprime
 7 assets from Merrill Lynch to unwitting investors by hiding the fact that Mainsail assets included
 8 subprime securities. This is not only implausible under *Twombly*, it is contradicted by the actual
 9 facts. Prior to the first purchase at issue 1) Merrill Lynch sent Plaintiff the latest PPM,
 10 containing 36 pages of risk disclosures and advising that 90% of Mainsail’s assets are invested in
 11 subprime securities, and 2) the day before the purchase at issue, the Merrill Lynch representative
 12 for Plaintiff advised Plaintiff of increasing market volatility and recommended joining the
 13 “Flight to Quality” by purchasing bonds issued by the Federal Home Loan Banks. For each of
 14 these reasons, the Quid Pro Quo Allegations should be stricken.

15 **D. The Litigation Allegations Are Neither Responsive Nor Relevant to**
 16 **Plaintiff’s Claims and Should be Stricken as Impertinent.**

17 Plaintiff also added allegations commenting on positions taken by Merrill Lynch in
 18 defending against this litigation (the “Litigation Allegations”).⁷ Such commentary, being
 19 “neither responsive nor relevant to the issues involved in the action” (*Wilkerson, supra*, 229
 20 F.R.D. at 170), should be stricken as impertinent. For example, Plaintiff pleads in Paragraph 34
 21 that “*Merrill has suggested during the course of this litigation that it and King County agreed at*
 22 *some time prior to July 2007 to alter, amend, or abandon the Dealer Certification.*” (emphasis
 23 added). Plaintiff is required to plead allegations that are “simple, concise, and direct” (F.R.C.P.
 24 8(d)(1)), and should be factual in nature. *See Twombly, supra*, 550 U.S. at 555-556, fn 3 (Rule

25 ⁷ See FAC ¶¶ 34, 43 (lines 22-23), 92 (lines 13-14), and fn 12, 37, and 55.

8(a) “contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented.”) Commentary by Plaintiff is neither responsive nor relevant to the issues involved in the action and does not constitute a factual allegation. For these reasons, the Litigation Allegations should be stricken as impertinent.

E. The Purported Recommendation Allegations are Contradicted By Plaintiff’s Prior Pleadings and The Offering Documents Sent To Plaintiff Prior To Its Purchases.

Plaintiff’s FAC also includes contradictory allegations about a “recommendation” to purchase Mainsail, sent two weeks before the purchase was actually made (the “Purported Recommendation Allegations”).⁸ When a complaint is amended by leave of court, as is the case here, “the amended complaint may only allege ‘other facts consistent with the challenged pleading.’” *Reddy v. Litton Indus., Inc.* 912 F.2d 291, 296-97 (9th Cir. 1990) (quoting *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.* 806 F.2d 1393, 1401 (9th Cir. 1986)). By including the Purported Recommendation Allegations, Plaintiff suddenly purports to remember for the first time, that the CIO made the purchases of Mainsail at issue based on the “recommendation” of a Merrill Lynch financial advisor after receiving an email identifying Mainsail as one of the “CP offerings you might like.” (FAC ¶¶ 10 n.5, 138). As discussed above, this allegation is contradicted by Plaintiff’s prior allegations admitting that Merrill Lynch did not solicit or recommend the July 27 and July 31 purchases of Mainsail (Compl. ¶¶ 78-87, 93), and the fact that Plaintiff received the PPM fully disclosing any risks. For these reasons, the Purported Recommendation Allegations should also be stricken.

IV. CONCLUSION

For the foregoing reasons, Merrill Lynch respectfully requests an order from the Court striking the prayed for paragraphs from the FAC.

⁸ See FAC ¶¶ 98 (line 16), 138, 176, 178, 187(a), 196(a) and fn 5.

1 DATED this 23rd day of February, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused to be electronically filed the foregoing and this Certificate of Service with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants:

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